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No. 08-82

OCT 14 2008

In the Supreme Court of the United States

IMS ENGINEERS–ARCHITECTS, P.C., PETITIONER

v.

PETE GEREN, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner entered into an Indefinite Delivery, Indefinite Quantity (IDIQ) government services contract and ultimately received orders within the range specified in that contract. The question presented is as follows:

Whether the Armed Services Board of Contract Appeals had authority to consider a claim that petitioner would have received additional orders under the IDIQ contract but for bad faith or other improprieties by the government party.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 34a-35a) is not published in the *Federal Reporter* but is reprinted in 274 Fed. Appx. 898. The opinion of the Armed Services Board of Contract Appeals (Board) (Pet. App. 1a-25a) is reported at 06-1 B.C.A. (CCH) ¶ 33,231. The opinion of the Board denying reconsideration (Pet. App. 26a-33a) is reported at 07-1 B.C.A. (CCH) ¶ 33,467.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2008. The petition for a writ of certiorari was filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a business firm that provides architect-engineering services in connection with hazardous, toxic, and radioactive waste sites. Petitioner's founder and president is a native of India and a Sikh. Petitioner has been certified as a socially and economically disadvantaged entity within the meaning of Section 8(a) of the Small Business Act, 15 U.S.C. 637(a). Pet. App. 2a.

On August 5, 1994, the Army Corps of Engineers for the Omaha District (Corps) awarded petitioner an Indefinite Delivery, Indefinite Quantity (IDIQ) contract to provide environmental consulting services at various sites. Pet. App. 3a, 4a. "An IDIQ contract does not provide any exclusivity to the contractor." *Travel Ctr.* v. *Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). Instead, "an IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time," subject to a "minimum quantity stated in the contract." *Ibid.* Once the government has purchased the contractually specified minimum quantity, "its legal obligation under the contract is satisfied" and "it is free to purchase additional supplies or services from any other source it chooses." *Ibid.*

The IDIQ contract in this case had an initial period of one year that was extendable at the Corps' option for up to four additional years. Pet. App. 4a. Under the contract, the Corps was obligated to purchase at least $2500 in services from petitioner during the initial contract period and was entitled to purchase up to $10 million in services over the full five-year period. *Ibid.* The IDIQ contract required petitioner to "perform all services" required "[u]pon receipt of duly executed delivery orders." *Ibid.* (brackets in original)

Petitioner's IDIQ contract also had a standard "termination for convenience" provision. Pet. App. 4a; see 48 C.F.R. 52.249-7. That provision stated that "[t]he Government may terminate this contract * * * for the Government's convenience or because of the failure of the Contractor to fulfill the contract obligations." Pet. App. 4a. The contract further provided that, "[i]f the termination is for the convenience of the Government, the Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services." *Ibid.*

During the initial one-year contract period, petitioner received and satisfactorily completed two delivery orders for services in amounts of $158,627 and $531,342. Pet. App. 5a; Gov't C.A. Br. 2 n.1. The current dispute involves the Corps' award and subsequent termination of a third delivery order (Delivery Order 3) to petitioner. In May 1995, the Corps issued a request for proposals for a six-month treatability study at an abandoned gas station on March Air Force Base. Pet. App. 6a-7a. In June 1995, petitioner submitted a proposal that called for a total payment of $932,828. *Id.* at 8a. Petitioner's proposal also stated that a subcontractor, Black & Vetach Waste Science, Inc. (B.&V.), would perform 85% of the total work. *Ibid.* In July 1995, the Corps issued Delivery Order 3, which called for petitioner to perform $932,282 in services and complete the work by December 1995. *Id.* at 8a, 10a.[1]

Petitioner was unable to agree to terms of a subcontract with B.&V. Pet. App. 9a; Gov't C.A. Br. 6. On November 6, 1995— more than three months into the five-

[1] In September 1995, petitioner received and satisfactorily completed two additional delivery orders for services in amounts of $104, 905 and $171,899. Pet. App. 12a.

month performance period for Delivery Order 3—petitioner had still not performed any work in connection with the treatability study. *Id.* at 10a. On that date, an official at March Air Force Base asked the Corps to terminate Delivery Order 3 for the convenience of the government and to award the project to a different contractor under an existing IDIQ contract. *Ibid.* On March 28, 1996, the Corps awarded a modified version of the project to a different contractor for $615,332. *Id.* at 11a. On May 2, 1996, the Corps informed petitioner that it was terminating Delivery Order 3 pursuant to the termination-for-convenience provision in petitioner's IDIQ contract and asked petitioner to submit "any costs that have been incurred in the preparation and submission of the cost proposals for this requirement." *Id.* at 11a-12a. Petitioner had not performed any work pursuant to Delivery Order 3 as of May 2, 1996, and it did not submit a termination settlement proposal. *Ibid.* On October 1, 1997, the Corps informed petitioner that it had elected not to exercise the third option year under the IDIQ contract and that the contract had therefore expired on August 4, 1997. *Id.* at 13a.

2. a. On May 2, 2000—four years after the Corps terminated Delivery Order 3 and more than two-and-a-half years after the Corps gave notice that it was not exercising its option to further extend the IDIQ contract—petitioner submitted to the contracting officer a request for an equitable adjustment of $5,773,760. Pet. App. 14a. The contracting officer denied petitioner's claim. *Ibid.*

b. Petitioner appealed the contracting officer's decision to the Armed Services Board of Contract Appeals (Board). Pet. App. 14a-15a; see 41 U.S.C. 607 (2000).

Before the Board, petitioner sought $6,663,171 in damages. Pet. App. 1a.

After an evidentiary hearing, a panel of three administrative judges issued a unanimous written opinion that denied all of petitioner's claims. Pet. App. 1a-25a. The Board first stated that the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, limited its jurisdiction "to claims 'relating to a contract.'" Pet. App. 17a (quoting 41 U.S.C. 605(a)). As a result, the Board concluded that it "lack[ed] jurisdiction over allegations of irregularities in the selection process and misuse of IDIQ contracts," and it described such "issues" as being "reserved for other fora." *Ibid.*

The Board determined that the two issues that were properly before it were: "(1) whether the [Corps] acted in bad faith when it terminated [Delivery Order 3] for convenience; and (2) whether [the Corps] acted in bad faith when it failed to exercise the third and fourth option years of the contract." Pet. App. 17a-18a; see *id.* at 18a (citing Federal Circuit decision for the proposition that "termination for convenience results in a breach of contact" when the termination decision is "tainted by bad faith or an abuse of discretion"). The Board also observed, however, that "[g]overnment officials are presumed to act in good faith in the performance of their duties." *Ibid.* And, again citing Federal Circuit precedent, the Board stated that "[i]n order to rebut th[at] presumption," petitioner was required to demonstrate by "clear and convincing evidence" "that the [Corps'] actions were motivated by racial or ethnic bias or a specific intent to harm or get rid of [petitioner] because it was [a Section 8(a)] contractor." *Id.* at 18a-19a.

The Board concluded that petitioner had not met its burden of proof. Pet. App. 20a-24a. The Board ob-

served that it "ha[d] long held that unsubstantiated assertions do not constitute proof or evidence" and it determined that "[k]ey aspects of [petitioner's] case [we]re based on the unsubstantiated assertions of [its founder and president]." *Id.* at 20a. The Board identified several instances in which the testimony of petitioner's founder and president directly conflicted with that of other witnesses, and it resolved those conflicts in favor of the other witnesses. *Id.* at 9a-10a, 20a-21a. The Board also rejected petitioner's contention that the timing of and stated rationale for the Corps' termination of Delivery Order 3 demonstrated that the termination was improper. *Id.* at 21a-23a. With respect to the Corps' failure to exercise its options for the final two years of the potentially five-year contract period, the Board noted the contracting officer's testimony that the decision was made because "the district did not have enough work to justify exercising the options." *Id.* at 24a. The Board stated that petitioner had offered only "unsubstantiated allegations and conclusory assertions" to the contrary." *Ibid.*

The Board stated that it had "carefully reviewed [the contracting officer's] actions as well as the actions of other [Corps] personnel involved with [Delivery Order 3]," and that it had not "f[ou]nd any evidence of racial or ethnic discrimination or a desire to get rid of [petitioner] because it was [a Section 8(a)] contractor." Pet. App. 23a; see *id.* at 24a. The Board also "conclude[d] that the [Corps] ha[d] established a reasonable basis for its decision and that [petitioner] ha[d] not proven the elements necessary for relief." *Id.* at 24a.

c. Petitioner filed a motion for reconsideration, which the Board denied. Pet. App. 26a-33a.

3. Petitioner appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. See 41 U.S.C. 607(g)(1)(A). The court of appeals affirmed without opinion in a one-word, unpublished per curiam judgment order. Pet. App. 34a-35a.

ARGUMENT

Petitioner contends (Pet. i, 13-27) that the Armed Services Board of Contract Appeals (Board) erred in concluding that it lacked jurisdiction to review petitioner's claims of bad faith or improprieties in connection with the issuance of specific delivery orders under its validly executed IDIQ contract. Further review is not warranted.

1. The court of appeals issued no opinion in this case, and its one-word judgment order will have no precedential force in future cases. See Pet. App. 34a-35a. In addition, petitioner does not assert that the Federal Circuit's resolution of this case conflicts with any decision of this Court or another court of appeals. See Sup. Ct. R. 10(a) and (c). Petitioner's assertion that there is a "direct conflict" (Pet. 21) between various decisions of the Board itself and of the United States Court of Federal Claims, see Pet. 21-25, does not warrant this Court's review. Any such conflict can and should be addressed in the first instance by the Federal Circuit, which has exclusive jurisdiction over appeals taken from both the Board and the Court of Federal Claims. 28 U.S.C. 1295(a)(3); 41 U.S.C. 607(g)(1)(A). Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).[2]

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[2] At any rate, there is no conflict between the Board's decision in this case and any of the decisions cited by petitioner. *ABF Freight System, Inc.* v. *United States*, 55 Fed. Cl. 392 (2003) (see Pet. 24-25), held that a party that had been *awarded* an IDIQ contract could not seek review

2. The issues raised by the petition lack any meaningful prospective importance because the Federal Acquisition Streamlining Act of 1994 (Streamlining Act), Pub. L. No. 103-355, 108 Stat. 3243, which was enacted after the formation of the IDIQ contract at issue here and is therefore inapplicable to this case, has superseded the provisions of law under which petitioner's suit was adjudicated. The Streamlining Act "codif[ied] the government's IDIQ contracting authority." *Tyler*

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pursuant to a statute authorizing challenges by "disappointed bidders." *Id.* at 397 (citing 28 U.S.C. 1491(b)(1)). Although *L.P. Consulting Group, Inc.* v. *United States*, 66 Fed. Cl. 238 (2005) (see Pet. 24), suggested that the government's "implied obligation to carry out its duties under a contract in good faith" extended to the award of delivery orders under an IDIQ contract (see 66 Fed. Cl. at 243), the court did not cite two no-protest statutes that had been enacted after the award of the contract in this case but before the award of the contracts at issue in *L.P. Consulting Group, Inc.* See *id.* at 239 (stating that the two contracts at issue had been awarded in June of 1996); pp. 8-10, *infra*. And in the post-*L.P. Consulting Group, Inc.*, decision of *A&D Fire Protection, Inc.* v. *United States*, 72 Fed. Cl. 126, 134 (2006) (see Pet. 23-24), the Court of Federal Claims expressly held that one of the bid-protest bars that was not cited in *L.P. Consulting Group, Inc.*, "applies to task orders on multiple award IDIQ contracts." Petitioner acknowledges (see Pet. 26) that *Weeks Marine, Inc.* v. *United States*, 79 Fed. Cl. 22 (2007), "was a bid protest action" and thus did not present the question presented here, that is, "whether a holder of an awarded Federal Government Contract [may] use the Contract Disputes Act to remedy unfair treatment in task order selection." Pet. 26.

Petitioners' reliance on three previous Board decisions (see Pet. 21-23) is also misplaced. Unlike the IDIQ contract at issue here, the contracts at issue in those cases contained either express factors governing the award of delivery orders, *Burke Court Reporting Co.*, 97-2 B.C.A. (CCH) ¶ 29,323 (1997), or an express provision that the contractor would be given a "fair opportunity" to obtain delivery orders, *Community Consulting Int'l*, 02-2 B.C.A. ¶ 31,940, at 157,782 (2002); *L-3 Commc'ns Corp.*, 06-2 B.C.A. (CCH) ¶ 33,374 (2006).

Constr. Group v. *United States*, 83 Fed. Cl. 94, 99 (2008). It also provides that, subject to certain statutorily prescribed exceptions, "all contractors awarded [IDIQ] contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of $2,500." 10 U.S.C. 2304c(b) (so providing for military contracts); 41 U.S.C. 253j(b) (so providing for civilian contracts).

The Streamlining Act further provides, however, that, subject to one specifically enumerated exception, "[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." 10 U.S.C. 2304c(d); 41 U.S.C. 253j(d). In lieu of formal protests, the Streamlining Act requires the "head of an agency who awards" IDIQ contracts to "appoint or designate a task and delivery order ombudsman." 10 U.S.C. 2304c(e); see 41 U.S.C. 253j(e). The ombudsman must be "independent of the contracting officer for the contracts" in question and "shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders." 10 U.S.C. 2304c(e), 41 U.S.C. 253j(e). As the Court of Federal Claims has explained, the purpose of these provisions was to "exempt" from "agency protests, Government Accountability Office (GAO) protests *or judicial review*" "the issuance of individual task orders to contractors who had already received awards, subject to protest, of their master IDIQ contracts." *A&D Fire*

Prot., Inc. v. *United States*, 72 Fed. Cl. 126, 134 (2006) (emphasis added).

The "limitation on protests" set forth in the Streamlining Act "only applies to orders issued" and "authorized under" the provisions enacted as part of that statute. *Data Mgmt. Servs. Joint Venture* v. *United States*, 78 Fed. Cl. 366, 371 n.4 (2007); see 10 U.S.C. 2304c(f) (providing that "[t]his section"—which includes the protest bar—"applies to task and delivery contracts entered into under sections 2304a and 2304b of this title"); Streamlining Act § 1004(a), 108 Stat. 3249-3250 (enacting 10 U.S.C. 2304a and 2304b). The IDIQ contract at issue in this case was awarded on August 5, 1994, see Pet. App. 4a, more than two months before the October 13, 1994, enactment of the Streamlining Act. Because the statutory scheme that applies to petitioner's IDIQ contract was modified 14 years ago, this case is a particularly unsuitable vehicle for considering any broader issues (see Pet. 14-20, 25-27) raised by IDIQ contracting.

3. Even if the Board had exercised jurisdiction to consider petitioner's contentions that the contracting officer engaged in bad faith or other improprieties in failing to issue additional delivery orders under the IDIQ contract, those claims clearly would have failed on the merits. The Federal Circuit has held that when the government purchases the minimum quantity specified in an IDIQ contract, "its legal obligation under the contract is satisfied," and "it is free to purchase additional supplies or services from any other source it chooses * * * at its discretion," even in situations where agency's "contracting tactics" are "less than ideal." *Travel Ctr.* v. *Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). In addition, the Board specifically found in this case that

petitioner "ha[d] not proven that the actions of [Corps] personnel, either individually or in the aggregate, were motivated by racial or ethnic bias or a desire to get rid of [petitioner] due to its [Section 8(a)] status." Pet. App. 24a. There is no reason to believe that the Board would have reached a different conclusion had it specifically considered petitioner's claim that the Corps acted in bad faith in not issuing it more delivery orders under its IDIQ contract. See note 1, *supra* (noting that petitioner received and satisfactorily completed two additional delivery orders after the issuance of Delivery Order 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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